IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT HUNTINGTON

FRED WHITT,

Plaintiff, **Civil Action No.** 3:17-cv-02532

v. **JURY TRIAL DEMANDED**

HIGH VOLTAGE, INC.,

Defendant.

COMPLAINT

Your Plaintiff, Fred Whitt, by his counsel, Hoyt Glazer, Esq. and the Law Office of Hoyt Glazer, PLLC, files this legal action against the Defendant, High Voltage, Inc., seeking redress and remedy arising from the Defendant's deliberate failure to comply with the provisions of The Family and Medical Leave Act of 1993 ("FMLA"), the West Virginia Human Rights Act, the Consolidated Omnibus Budget Reconciliation Act ("COBRA"), and federal and state public policies and common law prohibiting illegal discrimination and retaliation against persons with disabilities who require time to receive medical treatment. Plaintiff requests a jury trial and relief sufficient to remedy the unlawful and outrageous employment practices of the Defendant.

PARTIES

1. Plaintiff, Fred Whitt, is, and at all times alleged, was, a citizen and resident of Cabell County, West Virginia.
2. Defendant, High Voltage, Inc, is a foreign corporation licensed to do business in the state of West Virginia with its principal office located in Ashland, Kentucky. Defendant also maintains a local office in Hurricane, West Virginia.

3. High Voltage, Inc. provides electrical contracting services in several states, and at all times alleged, conducted business in the state of West Virginia.
4. At all times alleged, Defendant acted by and through its agents, employees, supervisors, directors, members, officers and assigns and within the full scope of agency, office, employment, and/or assignment.

JURISDICTION AND VENUE

5. This Court has jurisdiction over this civil action under Article III, §2 of the United States Constitution and 28 U.S.C. §1331.
6. Venue is appropriate in this case under 28 U.S.C. §1391(b)(1) because the Defendant is a resident of the state of West Virginia as defined in 28 U.S.C. §1391(c)(2) and maintains its local office in Hurricane, West Virginia, and because a substantial part of the events giving rise to this claim occurred in West Virginia counties which are in the Southern District of West Virginia (28 U.S.C. §1391(b)(2)).

ALLEGATIONS OF FACT

7. On or about December 2001, Plaintiff began working as a groundman for Williams Electric.
8. On or about 2002, Plaintiff became an employee of Defendant when it purchased and assumed control of Williams Electric.
9. Over the course of his employment, Plaintiff performed the majority of his work in West Virginia in the southern coalfields of Logan, Boone, and Mingo Counties.
10. Plaintiff's job duties involved installing and repairing power lines for coal companies that were clients of Defendant.
11. At all times during his employment, Plaintiff met the legitimate expectations of the Defendant, and performed his duties satisfactorily.

12. During the last several years of his employment, Mr. Whitt was the oldest employee of at least a dozen other employees who worked with him.

13. On information and belief, the other employees with whom Mr. Whitt worked were all under 40 years old.

14. During his employment with Defendant, Plaintiff suffered several injuries at work.

15. While at work, on or about May 18, 2006, Plaintiff suffered an injury to his right shoulder and lower back.

16. Plaintiff received workers' compensation benefits for this injury and later underwent surgery on his shoulder, and required medication for his back injury.

17. As a result of this injury, Plaintiff missed more than three days of work, and required continuing treatment as defined in the Family and Medical Leave Act of 1993 ["FMLA"].

18. On or about August 18, 2008, Plaintiff hurt his neck, re-injured his back and almost lost his leg at work.

19. Plaintiff again received workers' compensation benefits, missed more than three days of work, and required continuing treatment as defined in the FMLA.

20. In 2013, Plaintiff suffered an injury when another employee of Defendant dropped a wrench on his back.

21. On or about September 9, 2014, Plaintiff fell off a truck during his work and sustained injuries.

22. Plaintiff, again, missed several days of work, and required continuing treatment under the FMLA.

23. For the last few years of Plaintiff's employment, Mr. Whitt's treating physician prescribed medication for the treatment of issues arising from Plaintiff's prior back injuries.

24. Also during the last few years of his employment, Defendant routinely administered drug tests to Mr. Whitt.
25. In early 2015, Mr. Whitt began coughing up blood and sputum at work.
26. On or about September 30, 2015, Mr. Whitt notified his foreman that he was going to see a healthcare provider to "have his breathing checked."
27. Over the next couple weeks, between September 30th-October 12th 2015, Mr. Whitt took time off from work to undergo medical testing.
28. Mr. Whitt informed Defendant's agents and employees about his doctor's appointments and provided doctors' notes to Defendant.
29. The Defendant also had knowledge of all of Plaintiff's previous injuries and his illness through releases from Plaintiff's doctor(s) and Plaintiff's workers' compensation claims.
30. Defendant did not, at any time during Plaintiff's employment, provide him with any individual notice of his legal rights and/or eligibility to take leave under the FMLA to care for and/or treat his serious health conditions.
31. During the time of Plaintiff's testing and treatment in the Fall of 2015, Defendant issued Plaintiff his first negative mark on a performance evaluation.
32. Specifically, Defendant alleged Mr. Whitt's performance was "unsatisfactory" in the category of "productivity."
33. On or about October 26, 2015, Mr. Whitt underwent a routine drug test.
34. On or about October 31, 2015, Mr. Whitt's drug test revealed a "positive" result for the medication prescribed to treat Plaintiff's back.
35. Mr. Whitt's drug test results were negative for all substances other than the one he was prescribed.

36. Mr. Whitt had tested positive for this medication on prior drug tests, and Defendant had not made an issue of said results because Mr. Whitt had provided prescription information to Defendant.

37. The person who interpreted the results of Mr. Whitt's drug test, told Plaintiff that he did not fail the drug test because the reported medication levels were within a range that he would expect for someone who had Plaintiff's prescription.

38. When Mr. Whitt spoke to a supervisor regarding the drug test results, Plaintiff was told "everything [was] ok."

39. On or about November 2nd, 9th and 16th, Mr. Whitt underwent additional pulmonary testing and CT scans and continued to notify Defendant of the same.

40. On November 16th, Plaintiff's healthcare provider issued a notice of Mr. Whitt's need for leave and/or request for accommodation to Defendant stating Mr. Whitt "needs to be off work secondary to new medical issues. Can do local office work in Huntington, WV area."

41. On November 16, 2015, Defendant terminated Mr. Whitt based on his October 2015 drug test results.

42. Defendant terminated Mr. Whitt the same day Plaintiff requested accommodation.

43. Mr. Whitt challenged the Defendant's use of his drug test to fire him, and requested to be rehired by the Defendant.

44. On information and belief, Defendant has rehired other employees who were fired for falsified and/or positive drug test results.

45. Defendant refused to rehire Mr. Whitt.

46. On information and belief, the employees who were rehired were all under 40 years of age.

47. At the time of his termination, Mr. Whitt was fifty-five (55) years old.

48. On December 3, 2015, approximately two weeks after Defendant fired him, Mr. Whitt received a diagnosis of lung cancer.

49. On information and belief, Defendant replaced Plaintiff with a younger employee who did not have a serious health condition.

50. Defendant has not, at any time since Mr. Whitt's termination, provided Plaintiff with COBRA notice.

51. As a result of Defendant's actions, Plaintiff has suffered emotional distress, lost income and benefits, medical expenses, and other damages.

COUNT I: INTERFERENCE WITH RIGHTS UNDER THE FAMILY AND MEDICAL LEAVE ACT

52. Plaintiff incorporates the previous paragraphs as if set forth herein.

53. At all times alleged, Plaintiff was qualified and eligible for leave under the FMLA due to his serious health condition(s).

54. Prior to and at the time of his termination, Plaintiff had been employed by Defendant longer than twelve (12) months and had worked at least twelve hundred fifty (1250) hours of service for Defendant in the prior twelve-month period.

55. Defendant is and was a covered employer under the FMLA, and employs 50 or more people within 75 miles of the location where Plaintiff was employed.

56. When an employee requests FMLA leave or the employer acquires information that an employee's leave may be for an FMLA-qualifying reason, the employer is required to provide individual notice to the employee regarding his eligibility for leave (29 C.F.R. §825.300(b)), rights and responsibilities under the FMLA (29 C.F.R. §825.300(c)), and notice regarding the designation of the employee's leave (29 C.F.R. §825.300(d)).

57. Plaintiff requested a medical leave of absence (FMLA leave) to treat his serious health

conditions and/or supplied sufficient notice about his conditions to the Defendant such that it required Defendant to provide individual FMLA notice to Plaintiff.

58. Under 29 C.F.R. §825.300(b)(1), eligibility notice "must state whether the employee is eligible for FMLA leave." If the employee is not eligible, the notice "must state at least one reason why the employee is not eligible." Id. §825.300(b)(2).

59. Notice of the employee's rights and responsibilities must be provided each time eligibility notice is required/provided. 29 C.F.R. §825.300(c)(1).

60. Although eligibility notice may be provided verbally or in writing, both rights and responsibilities and designation notice must be provided to the employee in writing.

61. Designation notice is required when an employer has enough information to determine if an employee's leave is being taken for an FMLA qualifying reason and must state how his leave will be designated, specifically, if the time off from work will be designated as FMLA leave, thereby counting toward the employee's 12 (twelve) weeks of protected FMLA leave. 29 C.F.R. §825.300(d)(1).

62. Defendant repeatedly, during the course of Mr. Whitt's employment, failed to provide Plaintiff with individual FMLA notice.

63. Defendant did not, at any time, provide Plaintiff with the required, individual notice of his rights and eligibility to take FMLA leave to care for his serious health condition(s).

64. Defendant failed to properly designate or provide notice of the designation of Plaintiff's leave.

65. The Defendant's failure to provide individual notice resulted in prejudice to Plaintiff and impairment of his legal rights because he could not make informed decisions about his medical leave, which includes, but is not limited to the duration of his protected FMLA

leave and could not structure his leave in a manner which would afford him the employment protections provided in the FMLA.

66. Defendant's actions against Plaintiff were reckless and in deliberate disregard of the FMLA's notice provisions.

67. Defendant terminated Plaintiff because he was eligible for and/or required leave under the FMLA to care for his serious health condition(s).

68. Defendant's termination of Plaintiff when it knew he was in need of leave and/or at a time when he notified Defendant that he had a serious health condition and was under a doctor's care was reckless and in deliberate disregard of the FMLA's notice provisions and Plaintiff's rights under the FMLA.

69. In terminating Plaintiff, when Defendant knew he was eligible for FMLA, Defendant knowingly and deliberately interfered with and violated Plaintiff's rights under the FMLA, and Plaintiff seeks all appropriate relief as requested in the prayer for relief.

COUNT II: DISCRIMINATION FOR EXERCISING RIGHTS AND ENGAGING IN PROTECTED CONDUCT UNDER THE FAMILY AND MEDICAL LEAVE ACT OF 1993

70. Plaintiff incorporates the previous paragraphs as if set forth herein.

71. Before requiring FMLA leave and notice, Plaintiff had been employed by Defendant for longer than 12 (twelve) months and had worked at least 1250 (twelve hundred fifty) hours of service for Defendant.

72. Defendant had notice of Plaintiff's serious health condition(s) for several years.

73. When Plaintiff notified Defendant of his serious health condition(s) and/or his need to take time off from work to care for and treat his condition(s), he gave adequate and proper notice of his need to take a medical leave of absence from work under the FMLA.

74. When Plaintiff requested and/or required FMLA leave, he was qualified and eligible for a leave of absence under the FMLA.

75. In seeking taking time off work to receive diagnosis and treatment for his serious health condition(s), Plaintiff took leave that could and/or should have qualified and been designated as FMLA leave.

76. As such, Plaintiff engaged in conduct protected under the FMLA that entitles him to all relief under the FMLA.

77. Defendant took adverse action against Plaintiff because Plaintiff requested and/or was eligible for FMLA leave.

78. Despite having been informed of Plaintiff's serious health conditions on multiple occasions and/or over several years, Defendant repeatedly failed to provide Plaintiff with FMLA's statutorily required individual notice(s) and terminated Plaintiff based on his taking time to receive treatment for his serious health condition(s).

79. Any reason alleged by Defendant for its termination of Plaintiff is pretext for Defendant's discrimination and retaliation against Mr. Whitt for his having engaged in conduct protected by the FMLA.

80. Defendant's conduct up to and including his termination is and was in bad faith, malicious, reckless and purposefully indifferent to Plaintiff's rights under the FMLA, and he seeks remedy as set forth in his prayer for relief.

COUNT III: RETALIATORY DISCHARGE

81. Plaintiff incorporates the previous paragraphs as if set forth herein.

82. Before his termination by Defendant in November 2015, Mr. Whitt had performed all conditions, covenants, promises, duties and responsibilities required of him and in

accordance and conformity with Defendant's legitimate expectations.

83. In the Fall of 2015, Plaintiff sought diagnosis and treatment for his lung condition and was subsequently diagnosed as cancer.

84. Plaintiff took several days off from work for his treatment and diagnosis and provided Defendant with documentation from his healthcare providers, information regarding his testing and treatment as well as his need for leave to receive the same.

85. On the day of his termination, Plaintiff presented his employer with a doctor's note requesting reasonable accommodation, specifically, to be placed on light duty pending treatment of his lung condition.

86. In seeking and receiving treatment for his disability, notifying Defendant of his need for FMLA-qualifying leave, and requesting a light duty accommodation, Plaintiff engaged in protected activity.

87. The Defendant had knowledge of Plaintiff's protected activities and took adverse action against him including but not limited to issuing an "unsatisfactory" productivity rating on his performance evaluation, termination, and refusal to rehire.

88. Defendant's above named actions against Plaintiff were retaliatory acts in violation of the public policies embodied in the FMLA, Federal Mine Safety and Health Act, Coal Workers' Health Surveillance Program (CWHSP), and West Virginia Human Rights Act.

89. Defendant's above described actions also followed his protected activities within such a period of time that the Court can infer retaliatory motivation.

90. The Defendant's treatment and termination of Plaintiff is a retaliatory and wrongful discharge in violation of public policy because:

A. The Plaintiff engaged in protected activity;

B. The Defendant was aware of Plaintiff's above described protected activities; and,

C. Defendant made adverse decisions concerning the Plaintiff including, but not limited to, its termination of Plaintiff.

91. Any reason alleged by Defendant for terminating the Plaintiff and denying Plaintiff employment benefits and fair, non-discriminatory treatment in the course of his employment is mere pretext for Defendant's real reason for firing the Plaintiff, which is Defendant's retaliation against Plaintiff for seeking and receiving diagnosis and treatment for his serious health condition and/or requesting reasonable accommodation.

92. Defendant and its agents knew or reasonably should have known that their actions taken against Plaintiff were false, wanton, willful, and malicious and designed and intended solely to harm him.

93. Defendant's actions are and were indifferent to Plaintiff's rights under the laws and public policies embodied in the FMLA, Federal Mine Safety and Health Act, CWSHP, West Virginia Human Rights Act, and the common law and public policies of the State of West Virginia.

94. As a direct and/or proximate result of Defendant's intentional, discriminatory and retaliatory acts against him, Plaintiff has suffered and continues to suffer injury, including, but not limited to, loss of past and future earnings and other benefits of employment, anguish, pain and suffering, humiliation, loss of enjoyment of life, costs associated with obtaining new employment, embarrassment, damage to his reputation and other past and future pecuniary losses. Wherefore, Plaintiff seeks relief as set forth below.

COUNT IV: DISABILITY DISCRIMINATION

95. Plaintiff incorporates the previous paragraphs as if set forth herein.

96. The Plaintiff is a person with a disability under the West Virginia Human Rights Act because he has a physical condition(s) which substantially limits one or more major life activities and/or he has a record of having such an impairment. W. Va. Code §5-11-3(m)

97. At all times, the Plaintiff is and was qualified for the job he held with the Defendant. This is because the Plaintiff satisfies and satisfied the skill, experience, and other job-related requirements for the position, and because Plaintiff was and is able to perform the essential functions of his job with or without reasonable accommodation.

98. The Defendant, by and through the actions of its agents intentionally discriminated against the Plaintiff based on his status as a person with a disability.

99. The Defendant's use of Plaintiff's positive drug test results to fire Mr. Whitt, when he had a valid prescription for the medication for which he tested positive, and/or when Defendant had previously not taken action against Plaintiff following similar such results, is pretext for the real reason, namely, the intentional discrimination by Defendant against Plaintiff based on his being a person with a disability.

100. As a direct and proximate result of the intentional discriminatory acts and practices of Defendant, the Plaintiff has suffered and continues to suffer injury, including past and future loss of income and other employment benefits, pain and suffering, mental anguish, humiliation, loss of enjoyment of life, embarrassment, and damage to his reputation, as well as other past and future pecuniary losses.

101. Defendant knew or reasonably should have known that its actions involving the termination of Mr. Whitt's employment were false, wanton, willful and malicious, intended to solely harm him and indifferent to his rights under the West Virginia Human Rights Act. Wherefore, Plaintiff requests judgment as set forth in the prayer for relief.

COUNT V: AGE DISCRIMINATION

102. Plaintiff incorporates the previous paragraphs as if set forth herein.

103. Throughout his employment, Plaintiff satisfied all requisite job qualifications, was qualified for the position that he held, and performed his job in a manner that met or exceeded the Defendant's legitimate expectations.

104. When Defendant terminated Plaintiff, Mr. Whitt was over 40 years of age.

105. The Defendant treated employees who are not in Plaintiff's protected age group (over 40 years of age) more favorably because of their ages.

106. On information and belief, the Defendant did not terminate employees under 40 years of age based on alleged positive drug test results and/or allowed such employees to subsequently be rehired.

107. The Plaintiff's age was a motivating factor in the Defendant's decision to take adverse action against Plaintiff including, but not limited to, termination.

108. Any reason alleged by Defendant for terminating the Plaintiff and denying Plaintiff employment benefits and fair, non-discriminatory treatment in the course of his employment is mere pretext for Defendant's real reason for firing the Plaintiff, which is Defendant's discrimination against Plaintiff based on his protected status as a person over 40 years of age.

109. Defendant's treatment of Plaintiff because of his age was done with malice and with reckless indifference to Plaintiff's rights under the West Virginia Human Rights Act and Plaintiff's emotional and physical well-being.

110. As a direct and proximate result of Defendant's actions, Plaintiff has suffered and continues to suffer substantial damages. Wherefore, Plaintiffs request relief as provided in

the prayer.

COUNT VI: FAILURE TO PROVIDE PROPER COBRA NOTICE

111. Plaintiff incorporates the previous paragraphs as if set forth herein.

112. Plaintiff is a qualified beneficiary under 29 U.S.C. §1167(3).

113. Plaintiff's termination is a qualifying event resulting in the loss of insurance coverage for Mr. Whitt. See, 29 U.S.C. §1163(2).

114. As such, Plaintiff was and is eligible for COBRA continuation coverage.

115. 29 U.S.C §1166 requires written notice to be provided to covered employees of their rights to continuation of health insurance coverage upon a qualifying event as defined in 29 U.S.C. §1163.

116. Defendant failed to provide notice of Plaintiff's COBRA eligibility to its health insurance plan administrator within thirty (30) days of the above stated qualifying event.

117. Plaintiff has not received notice of his COBRA rights at any time following his termination.

118. As a result of Defendant's failure to provide timely notice, Plaintiff suffered a loss of health insurance coverage resulting in increased difficulty and expense in receiving necessary treatment and medication.

119. In failing and/or refusing to give Plaintiff COBRA notice, the Defendant is liable under 29 U.S.C. § 1132(c)(1) for statutory damages to Plaintiff in an amount up to $110.00 a day from December 16, 2015. As such, Plaintiff seeks relief as requested in his prayer for relief.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff seeks damages as set forth below:

On Counts I and II, grant Plaintiff back wages, liquidated damages, compensatory damages, reinstatement and/or front pay, the costs of litigation, including court costs, any expert witness fees, reasonable attorneys' fees, and all other remedies allowed under the FMLA;

On Counts III, IV, and V, grant Plaintiff actual damages for lost wages, front pay, back pay, lost compensation, fringe benefits, and other out of pocket expenses actual damages according to the evidence and as determined by a jury;

On Counts III, IV, and V, grant Plaintiff general and compensatory damages for annoyance, inconvenience, embarrassment, humiliation and emotional distress suffered by Plaintiff as a direct and proximate result of Defendant's conduct;

On Counts III, IV, and V, grant Plaintiff punitive damages in an amount to be determined by a jury and sufficient to deter future improper conduct and to punish the Defendant for its reckless and willful actions;

On Count VI, grant Plaintiff damages in the amount of $110.00 per day, for each day in violation of the COBRA, attorney fees, costs and such further relief as is just and proper.

Prejudgment and post-judgment interest on all amounts allowed by law;

All costs incurred in pursuing this action;

Attorney fees; and

Such other relief as this Court deems fair and proper in the interest of justice.

PLAINTIFF REQUESTS A TRIAL BY JURY ON ALL ISSUES.

PLAINTIFF, FRED WHITT,
By Counsel,

s/Hoyt Glazer________________
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